

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM A. REDD

Claimant

VS.

KANSAS TRUCK CENTER

Respondent

AND

**UNIVERSAL UNDERWRITERS
INSURANCE CO.**

Insurance Carrier

Docket No. 1,020,892

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 9, 2008, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 20, 2008. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) concluded that claimant sustained an injury to his left hand at work on May 14, 2003, and thereafter suffered a series of work related injuries to his left and right upper extremities through his last day of work, December 11, 2003. Using December 11, 2003, as claimant's date of accident for calculation purposes, she found claimant's gross average weekly wage to be \$866.65. The ALJ considered the opinions of Dr. J. Mark Melhorn, Dr. James Gluck, Dr. Pedro Murati, and Dr. Paul Stein and found that claimant sustained a 21 percent impairment of function to his left upper extremity and a 10 percent impairment of function to his right upper extremity. The ALJ concluded that claimant's bilateral upper extremity injuries did not result in permanent and total disability, so claimant was limited to an award based on his scheduled injuries. The ALJ also concluded that claimant failed to produce evidence from a physician that he was unable to work from November 19, 2004, to January 11, 2005, and denied his request for temporary total disability benefits during that time frame.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Although they were raised to the ALJ and in the parties' briefs, during oral argument to the Board the parties agreed that average weekly wage, notice, and the admissibility of the social security documents were not issues the Board needed to review. Therefore, the findings of the ALJ on those issues are affirmed.

Claimant requests review of the issue of the nature and extent of disability, arguing that claimant is permanently totally disabled. Claimant also argues that he is entitled to temporary total disability benefits from November 19, 2004, to January 11, 2005. Finally, claimant asks that the Board affirm the ALJ's finding that he suffered a series of accidents and injuries to his bilateral upper extremities each and every working day from May 14, 2003, through December 11, 2003.

Respondent requests that the ALJ's findings concerning claimant's alleged permanent total disability and the denial of temporary total disability benefits for the period of November 19, 2004, and January 11, 2005, be affirmed. Respondent admits claimant suffered a crush injury to his left hand on May 14, 2003, but requests the Board find that he failed to meet his burden of proving he suffered any other injuries to his upper extremities, and in particular his right upper extremity, as a result of that crush injury.

The issues for the Board's review are:

- (1) What is claimant's date of accident?
- (2) Is claimant entitled to an permanent total disability award, or is he limited to scheduled injury awards?
- (3) Is claimant entitled to temporary total disability compensation for the period of November 19, 2004, to January 11, 2005?

FINDINGS OF FACT

Claimant began working for respondent in June 1996 as a diesel truck mechanic. His regular job involved rebuilding transmissions, although he also performed work on clutches and suspensions. On May 14, 2003, claimant suffered a crush injury to his left hand. Claimant saw Dr. Larry Ensz that same day and was put on light duty. Dr. Ensz referred him to Dr. Jonathan Loewen, who referred him to Dr. George Lucas.

Claimant did not miss any time from work as a result of his injury, other than for doctor appointments. Even though he was restricted to light duty, respondent did not

accommodate his restrictions. Claimant said he therefore had to find different ways to perform his job. He tried not to use his left hand and thumb area. He would carry objects by placing them across the forearm of his left hand. Or he would tie a rope around his neck to support heavy parts. If a coworker was around, he would ask for assistance. Most of the time, however, he performed the tasks himself, working with his right hand.

Claimant testified he started developing problems with his right upper extremity three to four weeks after his initial injury. He started wearing wrist wraps on both his right and left wrists in July 2003 and wore those wraps to work and when he went to the doctor. He told a supervisor about the problems he was experiencing with his right upper extremity and was told to do his job the best he could. He also testified that he told the insurance carrier's adjuster that he was having problems with his right hand. He was not referred to a doctor for treatment to his right hand by either respondent or its insurance carrier. He testified that he also told Dr. Lucas about the problems he was having with his right upper extremity but could not remember if he mentioned the problems to Dr. Loewen.

On December 11, 2003, claimant went to a doctor's appointment with Dr. Lucas, at which time Dr. Lucas ordered a custom spica splint for claimant's use. When claimant returned to work after the appointment, he was notified by respondent that it could not continue to allow him to work because of the restrictions placed on him by Dr. Lucas. Claimant last performed work for respondent on December 11, 2003, and was formally terminated by respondent in October 2004.

Claimant continued to be treated by Dr. Lucas until he was released in November 2004. He received temporary total disability benefits from his last day worked, December 11, 2003, until November 19, 2004. After his temporary total disability benefits were terminated, he attempted to find work. At the same time, he applied for social security disability benefits. Claimant said he looked for work for about 2 months and went to 15 to 20 potential employers but did not receive any offers of employment.

Claimant is now receiving social security disability benefits. He testified that the problems with his hands were not used in his application for social security disability but that he received the disability because of problems with his knees, back, and ankle. However, claimant's social security disability file indicates that claimant's primary diagnosis was degenerative changes, left distal ulna, radius, and first carpal metacarpal joint. His secondary diagnosis was minimal lower lumbar spondylosis. Claimant stated that he had problems with his lower extremities and back while working for respondent but was still able to work as a heavy truck mechanic.

In 1969, claimant injured his left arm in a work-related accident when he was working for Dillon's Bakery. He said that a bread pan snagged the top of his arm, and the cut eventually became infected. This became life-threatening, and he had two surgeries on his arm and was off work for about eight months. Although his doctor told him he would probably never use his left arm to any extent again, claimant was determined and started

using it. Eventually he got to the point where he could do anything with his left hand that he could do with his right. He did not notice any problems with his left upper extremity again until his accident at respondent. Although he received a permanent impairment rating for his left upper extremity, he could not remember what that rating was.

Claimant said he previously had a carpal-tunnel like injury in his right upper extremity caused by using a grease gun. Claimant took aspirin for the pain and began using a new air grease gun with a light-duty trigger, and the pain dissipated. In the year before his injury of May 14, 2003, he had no problems with his right elbow while working for respondent.

Claimant was seen by Dr. Pedro Murati on January 11, 2005, at the request of his attorney. Dr. Murati is board certified in physical medicine and rehabilitation and is a board certified independent medical examiner. Claimant's chief complaints were weakness and swelling in his left hand, numbness and tingling in his left thumb, index and middle finger, and right hand pain. Dr. Murati was later authorized to treat claimant, and then referred him to Dr. J. Mark Melhorn, a board certified orthopedic surgeon who specializes in hands and upper extremities.

Claimant initially saw Dr. Melhorn on June 23, 2005. He diagnosed claimant with painful right and left hand and wrist, neuropraxia, and post left thumb CMC arthroplasty. Dr. Melhorn performed three surgeries on claimant: On October 18, 2005, he performed surgery on claimant's right wrist and elbow; on November 1, 2005, he performed surgery on claimant's left wrist for median nerve and left elbow for ulnar nerve; and on January 31, 2006, he performed a left thumb trigger release. Dr. Melhorn last saw claimant on February 28, 2006. At that time claimant was no longer having neuropraxia and numbness to the thumb, index, middle ring and little finger on the right or left but continued to complain of pain in his left wrist.

Based on the *AMA Guides*,¹ Dr. Melhorn rated claimant as having a 7.7 percent permanent partial impairment to the right upper extremity at the level of the arm and a 7.7 percent permanent partial impairment to the left upper extremity at the level of the arm. Based on the history and information provided to Dr. Melhorn, he believed that claimant's May 2003 injury and subsequent work activities contributed to the conditions Dr. Melhorn treated.

Dr. Melhorn assigned restrictions and limitations to claimant when he first saw him in June 2005 of light/medium work, task rotation, and limiting power and vibratory tools to two hours or less per eight hours. On February 14, 2006, he placed claimant on medium to medium/heavy work but still recommended task rotation. On February 28, 2006, at the request of claimant, Dr. Melhorn, released him to regular work with task rotation.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Melhorn believed that there are a variety of job activities that claimant could perform; however, claimant would not be able to return to his previous job at respondent.

Dr. James Gluck, a board certified orthopedic surgeon, examined claimant on September 22, 2005, at the request of the respondent for an opinion on causation. He reviewed claimant's medical records and took a history from claimant. Claimant complained of problems with his right upper extremity that included his index finger locking, numbness in the ulnar side of his palm, a stabbing pain in his right thumb that causes him to lose his grip, and right medial elbow pain. Concerning his left upper extremity, claimant complained of weakness to the left hand with loss of control, as well as a tingling sensation; pain in his palm and difficulty with movement of this thumb; and left dorsal thumb and radial-sided hand numbness. Further, claimant complained of a constant ache in both his hands when driving, with a burning pain into the forearm.

Dr. Gluck testified that with respect to claimant's left hand, claimant had problems in his left thumb from the injury of May 2003 and the resulting surgery. Claimant also had complaints of numbness in his left hand, but Dr. Gluck was unable to correlate his subjective complaints with objective abnormalities, other than to the left thumb CMC joint. Dr. Gluck testified that although claimant did not have any functional limitations due to the 1969 injury, he was sure claimant had limitations in motion to his left wrist before the May 2003 injury. He opined that claimant's loss of motion at the left wrist was due to the previous injury as well as the work injury of May 2003. But all changes at the thumb Dr. Gluck related to the May 14, 2003, injury.

Dr. Gluck said that the injury of May 14, 2003, was just to claimant's left hand and would not explain symptoms or problems with the right upper extremity. He did not think working for a seven-month period adequate time to develop a compensatory overuse injury. Also, he noted that claimant had been off work for a year and a half before his examination, and claimant had not seen any improvement in his symptoms in that period. In Dr. Gluck's opinion, this made it less likely that claimant's symptoms in the right upper extremity were due to the work he performed between May 14, 2003, and December 11, 2003.

Claimant was again seen by Dr. Murati on April 11, 2006, at the request of his attorney. He complained of his right second digit locking, pain in his right thumb with a grinding sensation, a burning sensation in his right hand, and numbness and tingling in the fingers of his right hand. He also stated that his hands go numb while driving, with the numbness extending to the level of his elbows. Claimant complained that his right shoulder felt out of alignment and also complained of swelling in both hands, mostly for two hours after he wakes up in the morning. Dr. Murati noted that he had previously diagnosed claimant with right carpal tunnel syndrome, left radial nerve injury that was at maximum medical improvement (MMI), and left CMC joint arthroplasty that was at MMI.

After examining claimant, Dr. Murati diagnosed him with status post bilateral carpal tunnel release, status post right lateral epicondylectomy, status post right radial nerve elbow decompression, status post bilateral ulnar nerve elbow decompression, status post left first digit trigger release, and status post left first digit CMC joint arthroplasty. Using the *AMA Guides*, he rated claimant's right upper extremity impairment as 10 percent for carpal tunnel release, 10 percent for right status post ulnar cubital decompression, and 5 percent for the right lateral epicondylectomy. He rated claimant's left upper extremity impairment as 10 percent for post carpal tunnel release; 10 percent for post ulnar cubital decompression; 13 percent for the left first digit carpometacarpal joint arthroplasty; 10 percent thumb impairment for the left first digit trigger finger release, which converted to a 4 percent hand impairment, which converted to a 4 percent left upper extremity impairment; 16 percent thumb impairment for loss of range of motion of the left first digit, which converted to a 6 percent hand impairment, which converted to a 5 percent left upper extremity impairment. Using the Combined Values Chart, the right upper extremity impairments combined for a 23 percent right upper extremity impairment and a 37 percent left upper extremity impairment.

Dr. Murati said that claimant overused his right extremity after the injury to his left hand. He also opined that the type of heavy work claimant performed at respondent would easily produce an overuse injury.

Dr. Murati believed that claimant is now realistically unemployable. "He's got no hands, practically speaking."² He gave claimant restrictions of no climbing ladders, no crawling, no repetitive grasping or grabbing with the left hand and only occasional grasping or grabbing with the right hand, no heaving grasping with either hand, no lifting, carrying, pushing or pulling over 20 pounds and then only occasionally, and frequent lifting, carrying, pushing and pulling to 10 pounds. Claimant could occasionally use repetitive hand controls with his left hand, frequently with his right hand. Claimant should use wrist splints while working. He is not to use hooks, knives, or vibratory tools with either hand.

Dr. Paul Stein, a board certified neurological surgeon, examined claimant on August 2, 2006, at the request of the ALJ. Claimant told Dr. Stein that he suffers pain in the palm of his left hand, in the left thumb, and a burning in the metacarpophalangeal joint of the left index finger. He had numbness and tingling in the left hand, particularly the back of the left thumb. Claimant also complained of numbness in the left forearm proximally on the radial side. He could not straighten his left thumb. Claimant also complained of pain on the radial side of the right wrist into the back of the middle finger. He had numbness and tingling, predominantly in the right small finger. Areas of his right hand burned and itched. Claimant stated he has a tendency to drop things from both his right and left hands and that driving made both hands go numb. In the morning, both hands are swollen, numb and tingling. He wakes up at night intermittently with numbness and tingling.

² Murati Depo. at 22.

Dr. Stein concluded that claimant suffered permanent injury to his left upper extremity in the area of the thumb as a result of his work-related injury. Dr. Stein could not determine within a reasonable degree of medical probability that claimant suffered permanent physical injury to his right upper extremity as a result of his work-related injury. Although claimant told him that he developed problems with his right upper extremity within three to four weeks after the injury to his left hand, in reviewing claimant's medical records, Dr. Stein could find no mention of right upper extremity symptoms in the records of Drs. Enszt, Loewen or Lucas. The first mention Dr. Stein could find of claimant complaining of right upper extremity symptoms was when he was evaluated by Dr. Murati, at which time claimant was no longer employed by respondent.

Dr. Stein testified that if he assumed that claimant developed problems with his right hand within three to four weeks after his crush injury, as claimant asserts, more probably than not the right upper extremity problems arose out of the work claimant did for respondent. However, Dr. Stein based his opinion on the fact that claimant saw various doctors, one who was a hand specialist, and there was still no mention of problems with the right arm.

Dr. Stein gave claimant permanent restrictions that include both his right and left upper extremity. Those restrictions keep claimant from returning to work as a heavy truck mechanic. He reviewed the task list prepared by Jerry Hardin and agreed that claimant would not be able to perform the mechanic jobs or welding jobs claimant performed in the 15-year period before his crush injury. Dr. Stein said that there are certain tasks that claimant could perform, but the majority of the essential functions he could not. Dr. Stein reviewed the task list prepared by Steve Benjamin and he opined that claimant was unable to perform 21 of the 34 tasks for a task loss of 62 percent within the restrictions he had relative to his left hand.

Based on the *AMA Guides*, Dr. Stein rated claimant as having a 21 percent permanent partial impairment to the left upper extremity at the level of the thumb, which converts to 9 percent impairment to the hand, 8 percent to the left upper extremity. He also believed, within a reasonable degree of medical probability, that the crush injury of May 14, 2003, resulted in a 10 percent permanent partial impairment to claimant's left upper extremity for carpal tunnel syndrome. These ratings would combine for a 17 percent impairment to claimant's left upper extremity.

Dr. Stein opined that claimant likely has an additional 15 percent permanent partial impairment to the left upper extremity related to possible ulnar nerve entrapment at the elbow as well as decreased motion in the wrist. However, he was unable to relate that causally to claimant's injury of May 14, 2003. Dr. Stein found that claimant had no right upper extremity impairment related to the May 14, 2003, injury. Notwithstanding his opinion concerning causation, Dr. Stein believed that claimant had a 3 percent permanent

partial impairment to his right upper extremity for lateral elbow pain in conjunction with a decompression of the radial nerve.

Dr. Stein gave claimant permanent restrictions for his left hand of no lifting more than 15 pounds at any time, 10 pounds occasionally, and 5 pounds frequently but not continuously. Claimant should avoid intensive repetitive activity with the left hand. Dr. Stein also restricted claimant from work activities requiring fine movement of the left hand, particularly opposition of the thumb. Dr. Stein recommended the same restrictions for claimant's right hand based purely on his complaints, irrespective of a definitive diagnosis.

Jerry Hardin, a human resource consultant, met with claimant on April 24, 2006, at the request of claimant. Claimant was unable to fill out the general information form because of the injuries to his hands, so Mr. Hardin filled out the form for him, with claimant giving him the information requested. They prepared a list of the tasks claimant performed in the 15 years before May 14, 2003.

After considering Dr. Murati's report, Mr. Hardin opined that claimant is essentially and realistically unemployable. He pointed out that claimant's background and work history has been in very heavy manual labor. Considering claimant's age (56 at the time of the interview), lack of education (high school graduate), and lack of transferable skills, Mr. Hardin did not believe any company would employ him with Dr. Murati's restrictions.

Mr. Hardin reviewed Dr. Stein's report on claimant and said the restrictions placed on claimant by Dr. Stein are similar to the restrictions placed on him by Dr. Murati and that claimant would be unemployable based upon Dr. Stein's restrictions as well.

Steve Benjamin, a vocational rehabilitation consultant, met with claimant on February 19, 2007, at the request of respondent. Mr. Benjamin testified that he could reach the conclusion that claimant was unemployable if he referred only to the medical report of Dr. Murati. In referring to the medical report of Dr. Melhorn, Mr. Benjamin believed that claimant could earn \$600.40 per week, and in referring to the medical report of Dr. Stein, he believed claimant could earn \$428.36 per week.

Mr. Benjamin admitted that claimant had very few transferable skills, other than working as a mechanic, and that claimant's restrictions would prevent him from working at respondent as a gear technician without substantial accommodations. In going through the positions claimant held in the 15 years before his injury, Mr. Benjamin stated that he would make the same observation about claimant's ability to work in those positions. He also admitted that it would be unusual for an employer to employ a mechanic with claimant's restrictions.

Mr. Benjamin believed that claimant would be able to perform work as a counter or rental clerk, an office cleaner, a parts clerk, a security guard, or a vehicle or equipment cleaner. He acknowledged that claimant had never held any of those types of jobs in his

relevant work history. However, he said claimant's transferable skills are the amount of time he worked with heavy equipment, learning the parts and reading manuals, making him qualified for a parts sales clerk or counter clerk, even without sales experience.

Mr. Benjamin believed that even with Dr. Murati's restrictions, claimant would be able to perform the job tasks of a counter/rental clerk, a parts clerk, or a security guard. He acknowledged that a counter/rental clerk or parts clerk would likely require claimant to use a computer. Also, he admitted claimant did not have any experience as a security guard. All of the positions Mr. Benjamin believes claimant could still perform would require him to use his upper extremities at least a third of the day, except possibly a security guard.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.³

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury

³ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

(1) For loss of a thumb, 60 weeks.

....

(11) For the loss of a hand, 150 weeks.

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks

K.A.R. 51-7-8(c) states in part:

(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

....

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

K.S.A. 44-510c (a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-510c(b)(2) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

In *Casco*,⁴ the Kansas Supreme Court held:

In workers compensation litigation, when there is uncontroverted expert medical testimony linking the causation of the second injury to the primary injury,

⁴ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 4, 7, 8, 154 P.3d 494 (2007).

the second injury is considered to be compensable as the natural and probable consequence of the primary injury.

. . . .

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510(c)(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

ANALYSIS

Claimant suffered a severe crush injury to his left hand on May 14, 2003. He received medical treatment and was released to return to light duty work. However, the work claimant returned to and performed was not light. He had to compensate for his injured left hand. This included using his right hand more and using his left forearm instead of his hand to lift and carry objects. Within about three to four weeks, he started developing symptoms in his right hand and arm. These symptoms continued and worsened throughout the time he worked for respondent. Eventually, claimant underwent surgeries by Dr. Melhorn. These were to his right and left wrists for median nerve entrapment, his right and left elbows for ulnar nerve entrapment, right lateral epicondylectomy for radial nerve entrapment, and left thumb for trigger release. Dr. Melhorn opined that claimant's May 14, 2003, injury and his subsequent work activities contributed to these conditions. The Board agrees and finds that claimant's right and left upper extremity conditions developed as a natural consequence of his May 14, 2003, crush injury to his left hand and his subsequent overcompensation for that left-hand injury. As such, claimant's date of accident is May 14, 2003. His gross average weekly wage on that date entitles him to disability compensation to be paid at the maximum workers compensation rate of \$432.

Dr. Melhorn released claimant with the only permanent restriction being task rotation. Claimant was also given restrictions by the other examining physicians. These included:

Dr. Murati placed restrictions on claimant of no climbing ladders, no crawling, no repetitive grasping or grabbing with the left hand and only occasional grasping or grabbing with the right hand, no heaving grasping with either hand, no lifting, carrying, pushing or

pulling over 20 pounds and then only occasionally, and frequent lifting, carrying, pushing and pulling to 10 pounds. He said claimant could occasionally use repetitive hand controls with his left hand, frequently with his right hand and should use wrist splints while working. He is not to use hooks, knives, or vibratory tools with either hand.

Dr. Stein gave claimant permanent restrictions for his left hand of no lifting more than 15 pounds at any time, 10 pounds occasionally, and 5 pounds frequently but not continuously. He said claimant should avoid intensive repetitive activity with the left hand. Dr. Stein also restricted claimant from work activities requiring fine movement of the left hand, particularly opposition of the thumb. Dr. Stein recommended the same restrictions for claimant's right hand.

Comparing the above restrictions to claimant's job duties with respondent, it appears clear that claimant could not return to work and perform his former job duties. Furthermore, based on these restrictions and the testimony of claimant and the two vocational experts, Mr. Hardin and Mr. Benjamin, it does not appear that claimant could perform any of the jobs that he performed during the 15 years preceding his May 2003 accident, absent accommodations. However, this does not mean that claimant is incapable of performing substantial gainful employment. Mr. Benjamin disagreed with Mr. Hardin's opinion that claimant was unemployable based on the restrictions of either Dr. Murati or Dr. Stein, when claimant's age, education and lack of transferrable skills were taken into consideration. Although Mr. Benjamin acknowledged that claimant could be considered unemployable if he looked only at the opinions of Dr. Murati, the Board does not consider Dr. Murati's opinion on this question to be more credible or persuasive than the opinions of the other physicians who testified. Mr. Benjamin identified several jobs that claimant was able to perform within the restrictions of the other physicians. Based on the record taken as a whole, the Board finds that the presumption of permanent total disability has been rebutted.

Because his injuries are to parts of the body covered by the schedule in K.S.A. 44-510d, claimant's permanent partial disability compensation is limited to his percentages of functional impairment for the number of weeks allowed in that schedule.

Dr. Melhorn combined his findings and percentages of impairments into a single rating of 7.7 percent to claimant's left arm and the same 7.7 percent for the right arm. He added that it would be reasonable to give an additional 1 percent impairment at the level of the hand if claimant's left thumb was still symptomatic.

Dr. Stein rated claimant's left trigger thumb condition as 21 percent at the level of the thumb, 9 percent at the level of the hand, and 8 percent of the upper extremity. Whereas for the trigger finger release, Dr. Murati rated the impairment at 10 percent to the thumb, 4 percent to the hand and 4 percent to the left upper extremity. In addition, for loss of range of motion in the thumb, Dr. Murati rated claimant's impairment at 16 percent at the level of the thumb, 6 percent to the hand, and 5 percent to the level of the upper extremity. And for the carpometacarpal joint arthroplasty, Dr. Murati gave a rating of 13 to the upper

extremity. Both Drs. Stein and Murati rated claimant's left carpal tunnel syndrome and surgical release at 10 to the upper extremity. Dr. Stein did not rate claimant's left ulnar nerve entrapment, cubital tunnel syndrome, or right upper extremity conditions because he felt they were not related to claimant's work. Dr. Murati rated claimant's left ulnar cubital condition and resulting decompression surgery at 10 percent of the upper extremity. For the right upper extremity, Dr. Murati gave ratings of 10 percent for the carpal tunnel release, 10 percent for the ulnar cubital decompression, and 5 percent for the right lateral epicondylectomy.

Based upon the opinions of Drs. Melhorn, Stein and Murati, the Board finds claimant suffered permanent impairments of 16 percent at the level of the hand for claimant's carpometacarpal joint and trigger thumb injuries on the left, 10 percent at the level of the forearm for the left carpal tunnel syndrome, 10 percent at the level of the arm for the cubital tunnel/ulnar nerve decompression on the left, 10 percent at the level of the forearm for the right carpal tunnel syndrome, and 15 percent at the level of the arm for the right ulnar cubital tunnel decompression and lateral epicondylectomy. For purposes of computation, claimant's 52 total weeks of temporary total disability compensation will be divided equally between his five scheduled injuries, thereby apportioning 10.4 weeks of temporary total disability benefits to each.

Claimant underwent left carpometacarpal joint arthroplasty on April 6, 2004. He was released to return to work after July 19, 2004, with restrictions, but no light duty work was available. Dr. Lucas determined claimant was at MMI on November 2, 2004, and released him from further treatment. Temporary total disability was terminated effective November 19, 2004. Claimant was examined by Dr. Murati on January 11, 2005, and found not to be at MMI. Dr. Murati became claimant's authorized treating physician following a preliminary hearing on March 8, 2005. Claimant remained unemployed and symptomatic. He ultimately came under the care of Dr. Melhorn by referral from Dr. Murati, who determined claimant was not at MMI. Dr. Melhorn provided additional treatment, including surgeries. Claimant's temporary total disability compensation was reinstated by the ALJ effective January 11, 2005, but the ALJ denied claimant's request for temporary total disability compensation for the period between November 19, 2004, and January 11, 2005, because no physician had said claimant was unable to work during this period. Claimant did not testify that he was unable to work. He testified that he attempted to return to work for respondent after he was released by Dr. Lucas but was not allowed to return. In fact, he was terminated by respondent without any explanation. Presumably respondent could not accommodate his restrictions, but this was not expressly communicated to claimant at that time. Claimant believed he could work. This may not have been a realistic belief. Nevertheless, in the absence of an opinion from a physician that claimant was unable to work during the period of November 19, 2004, to January 11, 2005, the ALJ's denial of temporary total disability compensation is affirmed.

CONCLUSION

(1) Claimant's bilateral upper extremity injuries developed as a natural consequence of his admitted May 11, 2003, injury to his left hand. Accordingly, his date of accident for computation purposes is May 11, 2003.

(2) Claimant is entitled to permanent partial disability compensation for the five scheduled injuries as follows:

- 16 percent at the level of the hand for claimant's carpometacarpal joint and trigger thumb injuries on the left
- 10 percent at the level of the forearm for the left carpal tunnel syndrome
- 10 percent at the level of the arm for the cubital tunnel/ulnar nerve decompression on the left
- 10 percent at the level of the forearm for the right carpal tunnel syndrome
- 15 percent at the level of the arm for the right ulnar cubital tunnel decompression and lateral epicondylectomy

(3) Claimant is not entitled to temporary total disability compensation for the period of November 19, 2004, to January 11, 2005.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 9, 2008, is modified as follows:

LEFT HAND

Claimant is entitled to 10.4 weeks of temporary total disability compensation at the rate of \$432 per week in the amount of \$4,492.80 followed by 22.34 weeks of permanent partial disability compensation, at the rate of \$432 per week, in the amount of \$9,650.88 for a 16 percent loss of use of the left hand, making a total award of \$14,143.68.

LEFT FOREARM

Claimant is entitled to 10.4 weeks of temporary total disability compensation at the rate of \$432 per week in the amount of \$4,492.80 followed by 18.96 weeks of permanent partial disability compensation, at the rate of \$432 per week, in the amount of \$8,190.72 for a 10 percent loss of use of the left forearm, making a total award of \$12,683.52.

LEFT ARM

Claimant is entitled to 10.4 weeks of temporary total disability compensation at the rate of \$432 per week in the amount of \$4,492.80 followed by 19.96 weeks of permanent partial disability compensation, at the rate of \$432 per week, in the amount of \$8,622.72 for a 10 percent loss of use of the left arm, making a total award of \$13,115.52.

RIGHT FOREARM

Claimant is entitled to 10.4 weeks of temporary total disability compensation at the rate of \$432 per week in the amount of \$4,492.80 followed by 18.96 weeks of permanent partial disability compensation, at the rate of \$432 per week, in the amount of \$8,190.72 for a 10 percent loss of use of the right forearm, making a total award of \$12,683.52.

RIGHT ARM

Claimant is entitled to 10.4 weeks of temporary total disability compensation at the rate of \$432.00 per week in the amount of \$4,492.80 followed by 29.94 weeks of permanent partial disability compensation, at the rate of \$432.00 per week, in the amount of \$12,934.08 for a 15 percent loss of use of the right arm, making a total award of \$17,426.88.

IT IS SO ORDERED.

Dated this _____ day of August, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the majority's decision with regard to the method of calculating the award. The majority's determination that *Casco* applies to this situation is the correct determination. But the majority then calculates each section of the upper extremities separately. This is not contemplated nor required by *Casco*. In *Casco*, the court only considered bilateral shoulder injuries. The injuries did not include separate parts of each upper extremity as is the case here. The majority, in providing ratings for each section of the upper extremities, contradicts the instructions contained in the *AMA Guides*. The *AMA Guides* instruct that when considering multiple parts of an extremity, the separate upper extremity impairments are to be determined for each part. Then, the upper extremity impairments are to be combined using the Combined Values Chart on p. 322 of the *AMA Guides*. (*AMA Guides*, sec. 3.1a, p. 3/15; sec. 3.1n, p. 3/65; sec. 3.1o, p. 3/66; sec. 3.1o, p. 3/72). The undersigned would determine the upper extremity impairments for each separate part as done by the majority, but, then, combine the upper extremity impairments as instructed in the *AMA Guides*.

This specific issue is a dispute raised between the various Board Members at the time of the appeal regarding how to properly compute impairments when dealing with multiple body part injuries in the extremities. This dispute will arise each time the Board is asked to consider extremity injuries when the claimant is not found to be permanently and totally disabled and when the claimant has more than one body part injured in one or more extremities. Thus, the issue must be decided not only in this case, but in every such case that arises and is appealed to the Board until such time as the appellate courts decide the issue. Therefore, this Board Member believes the consideration of the *AMA Guides*, as is required by K.S.A. 44-510d(a)(23), is germane to this dispute.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge